

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MICHAEL DEMIL, an individual,

Plaintiff/Counter-Defendant,

vs.

Case No. 2012-889-CK

RMD HOLDINGS, LTD, a Michigan corporation
and ROBERT E. DEMIL, an individual,

Defendants/Counter-Plaintiffs.

_____ /

OPINION AND ORDER

The Court has previously held that Defendant Robert E. Demil (“Defendant Demil”) is liable for oppressing Plaintiff’s rights as a shareholder of Defendant RMD Holdings, Ltd. (“RMD”) under MCL 450.1489. The task before the Court is to determine what form of relief should be utilized under MCL 450.1489 in order to remedy the oppression.

Factual and Procedural History

This matter involves alleged shareholder oppression and other corporate governance matters. Defendant RMD Holdings, Ltd. (“RMD”) is a fencing contracting business. Defendant Demil and Plaintiff are the only voting shareholders of RMD, with Defendant R. Demil holding 51% and Plaintiff M. Demil holding the remaining 49%.

On March 22, 2013, Plaintiffs filed their second amended complaint in this matter asserting claims for: Count I- Shareholder Oppression under MCL 450.1489; Count II- Breach of Fiduciary Duty; Count III- Breach of Contract; Count IV- Accounting; Count V- Violation of the Whistleblower’s Protection Act and Count VII- Dissolution. In addition, Defendants have filed a counter-complaint against Plaintiff M. Demil for breach of fiduciary duty.

On August 11, 2014, the Court issued its Opinion and Order granting Plaintiff summary disposition as to his shareholder oppression claim. In addition, the Court ordered both parties to propose terms of a shareholder buy-out under MCL 450.1489(e). The proposals were to include the method by which the buy-out should be effectuated, the date they believe a potential appraisal should be based on, the appraiser they suggest if an appraisal is ordered, as well as any support for their positions/requests.

After the parties submitted their proposals, the Court scheduled an evidentiary hearing regarding valuation. Over the course of March 24-25, and April 1, 6-7, 2015, the Court held an evidentiary hearing during which the Court took testimony and documentary evidence regarding the terms of a forced buy-out pursuant to MCL 450.1489. At the conclusion of the hearing, the Court ordered the parties to submit their proposed findings of fact and conclusions of law, as well as any options they would like to suggest in the alternative to a forced-buyout. The parties have since filed the requested briefing. The Court has reviewed the lengthy record in this case, including the briefing submitted by the parties, and testimony taken during the hearings, and it is now prepared to render its decision.

Arguments and Analysis

Plaintiffs' shareholder oppression claims are based upon MCL 450.1489, which provides:

(1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.

(3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of

employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

The Court has previously held that Defendant Demil has oppressed Plaintiff's shareholder rights by approving RMD's budget, which includes Defendant Demil's wages, as well as the wages of other shareholder employees, for the last few years without Plaintiff's input or approval. Indeed, at the time RMD's articles of incorporation and bylaws were adopted Plaintiff was granted a right to vote, and de facto veto power, on any decision made by Defendant Demil regarding the wages, salaries, benefits and bonuses paid to RMD's shareholder employees, including Defendant Demil himself.

Shareholder interests within the meaning of section 1489 include voting at shareholder meetings. *Franchino v Franchino*, 263 Mich App 172, 184; 687 NW2d 620 (2004). In this case, the Court has held, and remains convinced, that Defendant Demil has willfully oppressed Plaintiff's right to vote on the annual budget each of the past four years, beginning on January 16, 2012 when he approved RMD's budget after Plaintiff Demil left the shareholder meeting, and continuing in 2013, 2014 and 2015 when he approved RMD's budget for each year without providing Plaintiff notice of any of the meetings or allowing him an opportunity to exercise his right to vote.

In addition, Plaintiff testified that the he and Defendant Demil disagreed regarding whether to promote Defendant Demil's son Andre, and about giving Plaintiff's son Henri a raise. Specifically, Plaintiff testified that Defendant Demil unilaterally approved Andre's promotion and unilaterally decided not to give Andre a raise. The December 5, 1990 "Stock Subscription Agreement" ("Stock Agreement") and Article III(d) of the RMD's amended articles of

incorporation provide that all decisions related to wages, salaries, bonuses and fringe benefits paid to a shareholder must be approved unanimously by all owners of common stock, which in this case are Plaintiff and Defendant Demil. Defendants have not presented any evidence that Plaintiff approved either of the above-referenced decisions. Consequently, the Court is convinced that the above-referenced unilateral decisions oppressed Plaintiff's right to vote/approve all shareholder compensation.

Moreover, the Court is convinced that the oppressive actions in this case were willful. It appears undisputed that the annual budget was approved by both brothers prior to 2012. While Defendants maintain that the procedure was informal, the fact that a procedure was utilized at all evidences that Defendant Demil was aware that Plaintiff's approval was needed. Moreover, even if Defendant Demil were to argue that he was, prior to the commencement of this litigation, not aware that Plaintiff's consent was required, he has certainly been advised of that requirement multiple times over the past three and a half years through this Court's orders and RMD's governing documents that have been at the center of this case. Despite such knowledge, Defendant Demil has continued to unilaterally approve RMD's budgets, which include shareholder compensation, for the past three years. The Court is convinced that, at a minimum, such actions were done willfully within the meaning of statute. For these reasons, the Court remains convinced that Defendant Demil engaged in oppressive conduct, and that at least a portion of those actions were taken willfully.

With respect to remedies for oppressive conduct, MCL 450.1489 provides, in part:

If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:

(a) The dissolution and liquidation of the assets and business of the corporation.

(b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.

(c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.

(d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

(e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.

(f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

Under MCL 450.1489, once a shareholder establishes “grounds for relief”—i.e., that oppression occurred—“the circuit court may make an order or grant relief as it considers appropriate.” This language emphasizes the court's affirmative authority to award relief and does not inherently contemplate another fact-finder whose determinations the court may be effectuating. *Madugula v Taub*, 496 Mich 685, 702; 853 NW2d 75 (2014). “Indeed, through the use of the word “may,” the phrase “as it considers appropriate,” and, significantly, the statement that the court is “without limitation” with respect to determining the appropriate relief available, the Legislature provided the circuit court wide discretion in deciding what relief, if any, should be awarded after shareholder oppression is established.” *Id.* “Such wide latitude to fashion relief is consistent with an action in equity. So too is the presence of damages within the nonexhaustive list of remedies enumerated in § 489, for while damages are generally considered legal relief awarded by a jury, a court of equity is likewise capable of awarding that relief. *Id.* at 702-703.

After reviewing the entire record in this case, the Court is convinced that a buy-out procedure similar to the one utilized in *Berger v Katz*, unpublished per curium opinion of the Court of Appeals, decided July 28, 2011 (Docket Nos. 291663 and 293880) is best suited to determine the value the parties interests in RMD. In *Berger*, the trial court, after finding that the defendants had engaged in oppressive conduct under MCL 450.1489, ordered defendants to value plaintiff's stock and then give plaintiff the option of either having his shares purchased by defendants or be able to purchase defendants' shares at the same price per share. *Id.* at 4. On appeal, the Michigan Court of Appeals affirmed the trial court's order. In its decision, the Michigan Court of Appeals held: "the statute gives a trial court broad discretion in deciding the appropriate remedy, and those remedied are not limited to those listed in MCL 450.1489(1)(a)-(f)."

While this Court will not utilize the exact remedy set forth in *Berger*, it is convinced that a buy-out procedure different than that specifically set forth in MCL 450.1489 is needed in this case. Plaintiff and Defendant Demil are the two people with the best understanding and appreciation of RMD's value. While both sides' experts have presented drastically different valuations of RMD, the Court is convinced that the only opinions as to value that should be determinative are those held by Plaintiff and Defendant Demil. Further, both parties have expressed an interest in buying the other side's shares in RMD. Consequently, the Court is convinced that the most equitable and best remedy in this case is to order RMD sold via an auction. Further, the Court is convinced that an independent third party should be appointed to conduct the auction. Specifically, the Court will appoint Patrick Dunleavy of Dunleavy & Associates, PLLC to develop and conduct the auction. The auction should be conducted in a manner that apportions the total sales price between the value of each voting and non-voting

share. Finally, although RMD's other shareholders are not parties to this litigation, the successful bidder will be required to offer to purchase all shares of RMD held by individuals/entities other than Plaintiff and Defendant Demil at the same price they are required to pay pursuant to the auction.

Conclusion

For the reasons discussed above, the Court hereby appoints Patrick Dunleavy of Dunleavy & Associates, PLLC, 300 Park St., Suite 285, Birmingham, Michigan 48009 as auctioneer for the purposes of developing and conducting an auction of RMD. Prior to the auction, Mr. Dunleavy shall apportion the % of RMD's value amongst the total voting and non-voting shares of RMD. The only parties that will be permitted to vote are Plaintiff Michael J. Demil and Defendant Robert E. Demil. The auction bids will be based on the total value of RMD; however, the winning party shall only be required to pay the losing bidder the portion of the winning bid attributable to that party's interest in the RMD. In addition, the winning bidder shall offer, within twenty-one days after the auction, to purchase any other RMD shareholders' interests in RMD for the portion of the winning bid attributable to their interest.

Mr. Dunleavy shall charge for his services at his ordinary rate. Mr. Dunleavy's fees shall be paid equally between Defendant Robert E. Demil and Plaintiff Michael J. Demil. Mr. Dunleavy shall contact the parties within fourteen (14) days of this Opinion and Order to discuss the auction, and the auction shall be conducted within sixty (60) days from the date of this Opinion and Order.

Pursuant to MCR 2.602(A)(3), the Court states this matter remains OPEN.

IT IS SO ORDERED.

/s/ John C. Foster

JOHN C. FOSTER, Circuit Judge

Dated: June 1, 2015

JCF/sr

Cc: *via e-mail only*

Benjamin J. Aloia, Attorney at Law, aloia@aloiaandassociates.com

Edward J. Hood, Attorney at Law, ehood@clarkhill.com

Theresa Lloyd, Attorney at Law, tlloyd@plunkettcooney.com

Rogue Tyson, Attorney at Law, rtyson@nationwidecos.com